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ALEXANDER L. STEVAS,
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NO. 83-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELMER LESTER, et al, Appellant

v.

EARL F. McGILL, Appellee.

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the assignment of a magistrate to adjudicate a quiet title action subjected Appellant to deprivation of property without due process of law and contravened the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the Court of Appeals for the State of Idaho and the Idaho Supreme Court properly reviewed and applied Article 5 of the Idaho Constitution and Idaho Code Sections 1-2210, 1-2208 and 1-2214 with respect to the assignment of a magistrate to adjudicate a District Court quiet title action.

3. Whether the Court of Appeals for the State of Idaho and the Idaho Supreme Court properly applied the case of Akins v. Texas as it relates to the assignment of a magistrate to adjudicate a District Court quiet title action.

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NO. 83-_____

IN THE

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OCTOBER TERM, 1983

ELMER LESTER, et al, Appellant

v.

EARL F. McGILL, Appellee.

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

OPINIONS BELOW

This case is on appeal from the Supreme Court of the State of Idaho as a result of assignment of an inferior court Magistrate for adjudication of a quiet title action. Trial jurisdiction of quiet title actions is reserved to general jurisdiction District Court Judges.

JURISDICTION

This proceeding involves the application of Idaho's statutes governing the appointment and assignment of magistrates. Appellant challenged the Order of the Idaho Supreme Court appointing a Magistrate to sit as a District Judge on both Idaho statutory and constitutional grounds and specifically alleged a violation of the 14th Amendment to the Constitution of the United States.

Included in Appendix B, infra, is a copy of the Notice of Appeal that Appellant filed in the Idaho Supreme Court on March 26, 1984. This Jurisdictional Statement is being filed within ninety (90) days of December 30, 1983, the date when the Idaho Supreme Court denied Appellant's Motion for Oral Argument and request for Written Opinion and denied Appellant's Petition for Review of an opinion by the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

Article 5, Sections 2, 12, 13, 19, 20, 26 of the Idaho Constitution and Idaho Code Sections 1-2208, 1-2210, 1-2214, 1-613 and 1-213 are set forth in Appendix C, infra.

STATEMENT OF THE CASE

This case originated as a quiet tile action brought by Appellee Earl F. McGill on June 23, 1972, against Appellants. The case was continually rescheduled as Appellee amended his Complaint, changed counsel and filed a supplemental Complaint. The District Court repeatedly vacated the trial date and scheduled twelve pre-trial conferences until finally the trial was set for February 23. Immediately prior to a February 16, 1982, pre-trial conference, the District Court judge who had held the case for almost ten years requested reassignment of the

case to a Canyon County, Idaho Magistrate.

The Supreme Court of Idaho, on request of the District Court Judge assigned a Magistrate to adjudicate a quiet title action in Canyon County, Idaho, (App. A, infra, p. 1a). Judgment was entered against the Appellants, (App. A, infra, p. 5a), and motion was made to void the judgment because the Magistrate was without constitutional and statutory jurisdiction to adjudicate quiet title cases, (Index to Appendices). Summary denial of the motion was entered by Supreme Court Order, (App. A, infra, p. 36a).

Petition for Reconsideration of the Order (Index to Appendices), was also summarily denied by Order, (App. A, infra, p. 38a). Assignment of the case to the Court of Appeals was then made by the Supreme Court, (App. A, infra, p. 40a). Motion to void the judgment was made to the

Court of Appeals (Index to Appendices), which was denied by written opinion (App. A, infra, p. 42a). Petition for review by the Supreme Court of the written opinion (Index to Appendices) was summarily denied (App. A, infra, p. 56a).

REASONS FOR NOTING JURISDICTION

This case involves the application of Article 5 of the Idaho Constitution and certain sections of the Idaho Code and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. This misapplication of Idaho law results in a violation of a fundamental principle of justice because litigants were not afforded a fair trial before a competent and qualified tribunal with jurisdiction to hear the subject matter. In addition, no interpretation has been made of a Magistrate's delegated jurisdiction by the Idaho Supreme Court, which denied on two occasions to

hear the question and summarily denied Appellant's petition to void the judgment of the Magistrate. Appellant therefore invokes the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(1)In its failure to recognize and defer to the state legislature's jurisdiction over inferior courts, the Idaho Supreme Court contravened the Due Process Clause.

The Idaho Constitution grants inferior court judge and magistrate selection and jurisdiction to the state legislature. Article 5, Section 2[1], provides as follows:

> "The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The court shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no

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[1]See Appendix C, infra, p. 60a.

changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts."

The Idaho Constitution not only grants the state legislature the power to set laws as regarding selection of judges but also allows it to prescribe statutes outlining the jurisdiction of all inferior courts in the state.

The state constitution further vests the legislature with authority over assignment and jurisdiction of judges[2] and filling of vacancies in judicial offices.[3]

With the constitutional mandate assumed, the Idaho legislature has assigned specific categories of cases which may be heard by magistrates.[4] These include personal property cases of action

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[2]Idaho Constitution, Article 5, Section 13, see Appendix C, infra, p. 61a.
[3]Idaho Constitution, Article 5, Section 19, see Appendix C., infra, p. 61a.
[4]Idaho Code §1-2208, see Appendix C, infra, p. 62a.

not exceeding $2,000.00, forcible entry and detainer, and probate. Not included in this statutory categorization are real property actions except within the realm of liens not exceeding $2,000.00 and probate administration.

The legislature has allowed the Idaho Supreme Court to specify categories of jurisdiction assignable to magistrates. This is to be done "by rule" of the Idaho Supreme Court[5]. In this case no generic rule was issued by the Court designating real property quiet title actions as an additional category assignable to magistrate judgment. No rulemaking with notice and request for comment was issued by the Court. Rather, the State District Court Judge originally assigned to the case, and who held the case for some ten years, requested that the case be assigned to a magistrate for hearing and judgment. Thereby

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[5] Idaho Code §1-2210, see Appendix C, infra, p. 64a.

was the subject matter jurisdiction of magistrates expanded. This was not done through legislative directive nor a generic State Supreme Court ruling, but by administrative designation.

Appointment and authority of magistrates is vested through the legislature which does so through their election and oath of office. The State District Court Judges have general jurisdiction by constitutional authority.[6] The Idaho legislature has never granted authority to the Idaho Supreme Court to elevate a magistrate to the position of a District Court Judge. Neither has there been a legislative grant of authority to magistrates to adjudicate real estate quiet title cases assigned by the Supreme Court.

The appointment of a magistrate to adjudicate a quiet title action was made without constitutional

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[6] Idaho Constitution, Article 5, Section 20, see Appendix C., infra, p. 61a.

or legislative mandate and resulted in abrogation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(2)The Akins vs. Texas[7], holding is limited to the assignment of state district court judges to other co-equal districts.

The Idaho Court erroneously made an overly broad interpretation of Akins. In that case, the United States Supreme Court upheld a Texas appointment of a trial judge to hear a criminal case. The Court held:

> "In the absence of a violation of fundamental principles of justice, a state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned.[8]

While the Idaho Court's reliance on this principle of law is well grounded, its application to the present case is misplaced. While Akins

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[7]Akins v. Texas, 65 Sup. Ct. 1276,325 U.S. 398,89 L. Fed. 1692 (1945).
[8]Ibid.

affirmed a Texas assignment of a district judge to hear a case in another district of equal jurisdiction and stature, no appointment of a magistrate to district court classification was at issue.

In that case, the Texas Supreme Court stated the legislature constitutionally had absolute jurisdiction over the creation of district courts and judgeships in the State of Texas. The Texas court went on to say that the principles were rooted in the constitution of Texas. Where there was a death or vacancy of a district judge, the legislature conferred on the Supreme Court or the administrative court authority to assign another district judge of equal jurisdiction to hear and try cases in the district court for which there was a vacancy.

The Constitution of the State of Idaho, Article 5, Section 12, also provides for

assignment of district judges from one district to another, which was exactly the position of the Texas court.

The Idaho Court interprets Idaho Code §1-2208 to stand for the proposition that the Idaho Supreme Court may assign any judge to provide judicial assistance to any inferior court. While the Idaho Supreme Court may assign to any court any judge for a fixed period or for a specific purpose, the statute does not allow for enlargement of jurisdiction or powers of inferior court magistrates, nor does it allow for the elevation of a magistrate to a district judge. It more clearly addresses the need for assignment of magistrates to counties other than that of their residence and assignment of district judges between districts.

The statute does not grant additional jurisdiction to magistrates. To allow such would

violate the clear intent of Idaho Code §§1-2208 and 1-2210.

The Idaho Court of Appeals in its opinion has also incorrectly interpreted Idaho Code §1-613[9] to stand for the proposition that the Idaho Supreme Court may elevate a magistrate to a district court judge and inferentially to Supreme Court justice.

The court's incorrect interpretation of Akins and Idaho Code §1-613, has resulted in Appellants not being afforded a fair trial and opportunity to

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[9]Idaho Code §1-613 states:

> "Whenever the administrative director's report indicates that there is need for judicial assistance in any court, the Supreme Court shall assign to that court any judge for a fixed period or for specific purposes. Any judge so assigned shall serve without additional compensation but shall be paid all reasonable expenses actually incurred by him in the performance of his duties hereunder, including reasonable expenses of travel and sustenance when required to perform duties outside the city of his residence."

See Appendix C, infra, p. 62a.

be heard by a competent and qualified tribunal.[10]

(3)White v. Marty precludes a magistrate from assuming subject matter jurisdiction to hear cases involving title to real property.

In reaching its interpretation of the Idaho Constitution and Idaho statutes, the Idaho Court of Appeals and Supreme Court ignored the holding in White v. Marty, 97 Idaho 85, 540 P.2d 270 (1975) where the Idaho Supreme Court stated:

> "We have examined the statutes and court rules as then applicable, and find no authority therein granting jurisdiction to magistrates to try eminent domain cases. Former Rule 25(a) did not grant jurisdiction to magistrates to try title to real property or adjudicate claims in eminent domain proceedings."

The issue of the Idaho Supreme Court's appointment of a magistrate to act as a district judge was not considered. Unless and until White is overruled by the Idaho Supreme Court, the general prohibition of magistrates hearing real

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[10] Foster v. Wallace, 81 Idaho 452, 347 P.2d 120 (1959).

property title cases should be followed. Absent a constitutional or statutory mandate, White should have been followed by the Idaho courts.

* * * * *

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction of the appeal

RESPECTFULLY SUBMITTED this 27th day of March 1984.

ADAMSON, YOUNG & McQUADE

By Henry McQuade
Henry McQuade

APPENDIX

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE ASSIGNMENT OF MAGISTRATE STEPHEN W. DRESCHER TO SIT AS DISTRICT JUDGE	LODGED 2-11-82 10:00 AM O R D E R /s/ B. Scherer

The Honorable Edward J. Lodge, Administrative Judge for the Third Judicial District of the State of Idaho, having requested the assignment of the Honorable Stephen W. Drescher to sit in the case of: Earl F. McGill v. Donald B. Fretwell, et al., Canyon County Case No. L-24547, now pending in the Ditrict Court in and for Canyon County, and in the interest of avoiding a postponement of the trial in the above captioned case.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Honorable Stephen W. Drescher, Magistrate Judge, is hereby

appointed to hold court as a District Judge and is hereby assigned to the Third Judicial District of the State of Idaho, in and for the County of Canyon, for the purpose of disposing of all preliminaries and other motions, matters and proceedings, and of presiding over the trial, if any, and final disposition of the above-entitled cause, in said Third Judicial District, Canyon County.

IT IS FURTHER ORDERED that the above-designated judge in accepting this assignment shall coordinate any formal hearings or trials through the trial court administrator of the judicial district to which he has been assigned and that in carrying out this assignment, the above-designated judge shall carry out any reporting requirements through the services of a district court reporter

in the Third Judicial District, and that the Third Judicial District administrative judge shall assign a district court reporter of said district or provide for the temporary appointment of a district court reporter to carry out such reporting duties in connection with the above-entitled cause as may be required by Judge Drescher.

IT IS FURTHER ORDERED pursuant to Rule 83(a)(3) of the Idaho Rules of Civil Procedure, any appeal taken from a judgment of Judge Drescher while he is acting as a District Judge under this order of assignment shall be made to the Supreme Court of Idaho.

IT IS FURTHER ORDERED that the Administrative Director of the Courts shall cause a copy of this order to be mailed to the district court clerk of the county in which the above-captioned

case originated, and that said district court clerk shall cause a copy of this order of assignment to be mailed to counsel for each of the parties, or, if either of the parties are represented pro se, directly to the pro se litigant.

BY ORDER OF THE COURT this 10th day of ~~January~~ February, 1982.

/s/ Robert E. Bakes
Chief Justice

State of Idaho)
County of Canyon) ss.

I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears in this office.
DATED

BILL A. STAKER
BILL A. STAKER, Clerk of the District Court and Ex Officio Recorder
By /s/ S. Lee
Deputy

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FILED

MAR 31 4_{33} PM '82

BILL A. STAKER

CLERK OF DIST. COURT

BY/s/ B. Scherer

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON MAGISTRATE DIVISION, CALDWELL

EARL F. McGILL, Plaintiff, vs. DONALD B. FRETWELL, aka DON FRETWELL, aka DONALD G. FRETWELL, aka DONALD FRETWELL and FRANCES K. FRETWELL, aka FRANCES FRETWELL, husband and wife; FAITHE FRETWELL, a divorced woman; ELMER LESTER and JANE DOE LESTER, husband and wife; JOHN	Case No. L-24547 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

HIBNES, SR. and JANE DOE HIBNES, husband and wife; JOHN HIBNES, JR. and JANE DOE HIBNES, husband and wife; ANNA M. ANDERSON, a divorced woman; STATE OF IDAHO; ROY MILLER; RICHARD H. ANDERSON; THE TRAVELERS INSURANCE COMPANIES, a corporation, and its subsidiary EQUITABLE FIRE AND MARINE INSURANCE COMPANY; and all unknown claimants in and to the following described real property situated in Nampa, Canyon County, Idaho, to-wit:

***property description deleted. Full text of Judgment including property description lodged with the Clerk of of the United States Supreme Court.

Defendants.

This matter came on for trial on the issues of equitable title to the realty and title to the personalty above-described property. All other

issues were reserved for future hearings. Mr. Merlyn W. Clark and Ms. Linda Holdeman of Hawley, Troxell, Ennis & Hawley were present on behalf of the plaintiff. Mr. Roger Williams was present on behalf of the defendants Lester, Hibnes and Hibnes. Mr. Vernon K. Smith was present on behalf of the defendant Donald Fretwell, and Mr. Mark Geston was present on behalf of the Traveler's Insurance Company. These counsel however did not participate in the course of the proceedings.

The interests of all other named defendants in the equitable title to the realty and the title to the personal proeprty (sic) therein, said property commonly being known as the Tiw(sic)-Lite Lounge, have been disposed of. The plaintiff McGill and the defendants Lester, Hibnes and Hibnes are the only

persons currently with viable claims on the property. The factual circumstances of the case were exceedingly complex.

The Court having considered the testimony of the witnesses and the exhibits introduced into evidence now being fully advised proceeds to rule:

THE FINDINGS OF FACT Hereby made by the Court after hearing and considering the matter are as follows:

1. That the plaintiff Earl McGill is an unmarried man and is a resident of Ada County, Idaho.

2. That the defendants Lester, Hibnes and Hibnes are residents of the State of Idaho.

3. That the real property that is the subject of the action is set forth and described as follows:

***property description deleted. Full text of Judgment including property description lodged with the Clerk of the United States Supreme Court.

Said property is commonly known as the Twi-Lite Lounge, and is situated in Nampa, Canyon County, State of Idaho.

4. That at all times material to the litigation herein legal title to said real property has been vested in Charles L. Skidmore and Lucille A. Skidmore, husband and wife.

5. That on or about August 2, 1968, the Skidmores sold a portion of the property set forth in paragraph 3 together with certain personal property located on the premises to Royal Miller and Hazel Miller, husband and wife, and Richard H. Anderson and Anna M. Anderson, husband and wife, under the terms of an unrecorded contract of sale. The contract granted said purchasers immediate possession of said premises. The contract provided that the title to the personal property therein described would vest in

the Millers and Andersons on August 2, 1968.

6. That on or about September 26, 1969, Skidmores, as vendors, and Millers and Andersons, as purchasers, entered into a supplemental agreement adding the remainder of the subject real property as described in paragraph 3 to the unrecorded contract of sale and changing the purchase price and the amount of the installment payments.

7. That on or about October 1, 1969, the said contract of sale, supplemental agreement and documents of conveyance were deposited with the Idaho First National Bank, Nampa Branch, Nampa, Idaho, as escrow agent under the terms of the agreement with said bank.

8. That on or about June 15, 1970, Millers and Andersons sold the subject real property as set forth and described in paragraph 3 together with certain

personal property to Donald G. Fretwell and Francis K. Fretwell, husband and wife, under the terms of an unrecorded contract of sale. Said contract granted Fretwells immediate possession of the property. Said contract made no provision for assignment or assumption of the Skidmore's contract. Said contract provided that title to the personal property therein described, except the liquor license, would vest in Fretwells on July 18, 1975.

9. That defendants Richard H. Anderson and Anna M. Anderson were divorced and Richard Anderson was awarded all the right, title and interest of said parties in and to the subject property and the rights of the parties in and to the Skidmore's contract and in and to the Fretwell's contract by virtue of a certain judgment

of divorce entered in the District Court of the State of Idaho in and for the County of Gooding, Docket #14684 on July 9, 1971.

10. That on August 1, 1971, title to the persona property described in the Skidmore's contract, except the liquor license, vested in Millers and Andersons, subject to the rights of Fretwells as contract purchasers under the terms of their contract.

11. Thaton or about August 18, 1971, Millers and Richard Anderson, as vendors, and Fretwells as purchasers, entered into a supplemental agreement wherein Fretwells agreed to assume the balance of the Skidmore's contract in the amount of $43,563.12, plus interest, and agreed to pay Millers and Andersons the sum of $15,275.91, plus interest, in monthly installments of $300.00.

Said payments were to be made to the Miller and Anderson-Fretwell escrow agent. Millers and Andersons agreed to assign Skidmore's contract to Fretwells on the express condition precedent that Fretwells pay the $15,275.91, plus interest, in full. The agreement specifically provided that the assignment of the Skidmore's contract to Fretwells was to be held in the Miller's and Anderson's - Fretwell's escrow account and would not be delivered to the Skidmore's - Miller's and Anderson's escrow agent until the sum of $15,275.91, plus interest, was paid in full.

12. That on or about August 18, 1971, Millers and Andersons executed an assignment of the Skidmore's contract to Fretwells. The assignment specifically provided that it was to be

deposited with the Miller's and Anderson's - Fretwell's escrow agent and was to be delivered to the Skidmore's - Miller's and Anderson's escrow agent only after Millers and Andersons were paid the sum of $15,275.91 in interest by Fretwells.

13. That while in possession of the Twi-Lite Lounge Donald Fretwell became indebted to the defendants Lester, Hibnes and Hibnes in the amount of $8,508.71. The defendants attempted to take an interest in the property to secure this debt on December 12, 1971.

14. That the defendants Lester, Hibnes and Hibnes were not aware that Fretwell's interest was subject to the original contract and a supplemental contract as set forth above.

15. That the Miller - Anderson to Fretwell contract of sale, supple-

mental agreement and assignment were deposited with the Idaho First National Bank, Nampa Branch, Nampa, Idaho, as escrow agent for the parties on or about August 31, 1971.

16. That the Fretwells failed to pay to the Millers and Andersons the sum of $15,275.91 in monthly installments or otherwise, and failed to perform the condition precedent to the assignment of the Skidmore's contract.

17. That on or about February 9, 1972, Millers and Andersons issued a notice to Fretwells that they were in default of their contract with Millers and Andersons and would be forfeited if not cured as provided in said notice. Fretwells failed to cure said default.

18. In march (sic), 1972, Millers and Andersons foreclosed the contract with Fretwells and completed a forfeiture

to all right and title interest of Fretwells and to the subject real property and personal property therein described. In doing so, Millers and Andersons withdrew all documents from the Fretwell's escrow agent and closed the account.

19. Thaton or about May 12, 1972, Millers and Andersons sold and conveyed to the plaintiff Earl F. McGill and Stanley W. Fretwell and Jacqueline Fretwell, husband and wife, the subject real property and the personal property then situated upon said premises, and all right, title and interest of the Millers and Andersons in and to the contract of sale from Skidmores. In performance of said agreement and conveyance, on May 12, 1972, Millers and Andersons executed and delivered to said purchasers a certain warranty deed. Said deed was

recorded June 23, 1972, as instrument #687793, records of Canyon County, Idaho.

20. That on or about March 2, 1982, Millers and Andersons provided to the plaintiff Earl F. McGill a certain bill of sale as evidence of conveyance of all personal property contained in the subject premises of this dispute retroactive to the 12th day of May, 1972.

21. That pursuant to said agreement of sale and the said conveyance from Millers and Andersons, plaintiff and Stanley Fretwells entered into possession of the subject property shortly after May 12, 1972, and the plaintiff has remained in possession of said property as more fully detailed herein.

22. That the plaintiff Earl F.

McGill and the Stanley Fretwells paid and discharged certain encumbrances upon the property, made certain permanent improvements thereto, and assumed the obligations of Millers and Andersons to Skidmores and fully performed and paid all obligations required to be performed by Millers and Andersons under the terms of the Skidmore's contract since May 12, 1972, as more fully detailed herein.

23. That on or about the 19th day of June, 1972, the plaintiff and the Stanley Fretwells having incorporated their interest in the Twi-Lite Lounge forming the Twi-Lite Lounge Incorporated, conveyed all right, title and interest to said real estate to said corporation.

24. That in April, 1973, the plaintiff Earl F. McGill purchased all of the interests of Mr. and Mrs. Stanley

Fretwell in the aforementioned corporation for the purchase price of $50,000.00.

25. That on the 2nd day of February, 1974, the Twi-Lite Lounge Incorporated was dissolved and all right, title and interest in the Twi-Lite Lounge real estate was deeded to the plaintiff Earl F. McGill.

26. That the State of Idaho, through its State Tax Commission, is not asserting an interest against said property in this litigation.

27. That a levy under a writ of attachment issued December 23, 1971, out of the District Court of Canyon County in Civil Case #23962, being an action by Elmer Lester, John Hibnes, Sr. and John Hibnes, Jr., plaintiffs, against Donadl G. Fretwell and Francis G. Fretwell, husband and wife, defendants, filed with the Office of Records of

Canyon County, Idaho, expired December 23, 1973, and is now void as a lien and of no future force and effect.

28. That the levy under said writ of attachment issued December 23, 1971, out of the District Court of Canyon County, Idaho, expired upon the dimissal of Civil action #23962 on September 7, 1973.

29. That subsequent to entry upon said premises in May of 1972, the plaintiff paid and discharged certain incumbrances upon the property including but not limited to certain tax liens, certain miscellaneous liens, certain judgements against the property and certain local improvement district taxes.

30. That upon entry of said premises and possession by the plaintiff and his associates at that time the Twi-Lite Lounge was badly burned and in

great disrepair and only modest clean-up efforts had been accomplished.

31. That in paying and discharging the aforementioned tax liens and judgement liens against said property and in making repairs consequential to the fire damage on said premises plaintiff expended sums of money in excess of $20,000.00.

32. That the plaintiff has been in continuous and uninterrupted possession of said premises since May of 1972.

33. That contemporaneous with the incorporation of the interests of the plaintiff herein and the Stanley Fretwells said Twi-Lite Lounge was incorporated as aforementioned, on June 23, 1972. Contemporaneous with that event the plaintiffs recorded their deed to said premises and filed the instantaneous

action.

34. Subsequent to filing the above-entitled cause plaintiff and the Stanley Fretwells were advised that the defendants Lester, Hibnes and Hibnes were claiming an equitable interest in said premises.

35. That in the assignment from Millers and Andersons to McGill and the Stanley Fretwells there is contained therein no language indicating that the plaintiff herein and the Stanley Fretwells were to assume the Skidmore's contract. However, the same was the intention of the parties. The plantiff has made payments on the Skidmore's contract since May of 1972.

36. That prior to June 23, 1971, the plaintiff was apprised only of those claims by the defendants as set forth in Exhibit #31 which indicates a certain

attachment on said property and the claim of the lien as set forth in finding #54.

37. That plaintiffs first became aware of the option under which the defendants claim a right, title and interest in the equitable state of the Twi-Lite Lounge subsequent to a receipt of a letter on the 3rd day of August, 1972.

38. That the plaintiff has now leased these premises to a third party for the purpose of operation of a night club and lounge and has rented said premises for the sum of $3,300.00 per month.

39. That the sum of $3,300.00 per month is a fair market rental for said premises.

40. That at the time the plaintiff assumed and entered said premises and took possession thereof, the fair market value of said premises was

$85,000.00

41. That at the date of trial of this cause the fair market value of the subject premises is $320,000.00.

42. That during the course of his possession therein the plaintiff has expended sums of money and effort towards the improvement of the said premises including but not limited to the initial repairs of the fire damage, the installation of a parking lot, and continuous and ordinary and customary maintenance and that said sums of money and efforts have contributed to the appreciation value of said property.

43. That at the time of the purchase by the plaintiff of the subject premises from Millers and Andersons May 12, 1972, it was the understanding and intent of the parties that the plaintiff herein was buying an equitable

ownership interest from the Millers and Andersons.

44. That at the time of the purchase by the plaintiffs from the Millers and Andersons on May 12, 1972, the total purchase price was $11,381.00. Miller testified that he and Andersons received only $10,000.00 therefrom explaining that the additional $1,381.00 was to be applied towards thenext due Skidmore payment. This indicates to the Court that it was the intention of all parties to the agreement of May 12, 1972, that indeed the plaintiff herein was to take equitable ownership of the property and to assume the Skidmore obligation and the Court so finds.

45. That at the time Millers and Andersons sold to the plaintiff they believe their equity to be $14,000.00 to $15,000.00.

46. That at the time Millers and Andersons sold to the plaintiff, Donald Fretwell owed and had remaining on his contract the sum of $15,000.00, $2,987.00 of which had been paid by Lester, Hibnes and Hibnes.

47. That when the defendants first approached the Millers and Andersons concerning their charges of claims against the property they represented the same to Andersons to be a lien.

48. That it was the intent of Millers and Andersons and the defendants Lester, Hibnes and Hibnes in entering into an "Option Agreement" dated the 9th day of March, 1972, and for the purposes of this litigation Defendant's Exhibit B, to merely secure the sums of money they had previously extended to the equitable owner Donald Fretwell as set forth in Finding #13.

49. That on numerous occasions the defendants represented to Millers and Andersons that they were not "club operators" and just wanted to get their money back.

50. That pursuant to the "Option Agreement" of March 9, 1972, the defendants made payments in the amount of $2,987.00 to Millers and Andersons under the terms and provisions of said agreement.

51. That Millers and Andersons accepted this money and have never returned same to defendants.

52. That subsequent to the aforementioned payment the defendants have never asked for a deed. They have never asked that more legal documents be drawn. They never asked for possession of the premises. They never asked for a liquor license. They never made fur-

ther payments thereon. They have never paid taxes thereon.

53. That Millers and Andersons at the time of entering into the option manifested by Exhibit B, believed that the defendants Lester, Hibnes and Hibnes herein had a valid lien against said property and by the agreement of March 9, 1972, intended to obligate themselves to the defendants Leser, Hibnes and Hibnes and create a lien to secure the debt.

54. That Miller and Anderson advised the plaintiff that the defendants had a lien against said property and the plaintiffs advised that they would "cross that bridge when they came to it".

55. That at the time of entering into the option agreement of March 9, 1972, and, manifested by Defendant's

Exhibit B, Millers and Andersons believed themselves entitled to any insurance proceeds as a result of the aforementioned fire. It was further agreed between Millers and Andersons and defendants Lester, Hibnes and Hibnes that upon Andersons' receipt of the insurance proceeds the defendants' lien against said property would be discharged.

THE CONCLUSIONS OF LAW which the Court hereby determines to be appropriate and applicable to the Foregoing Findings of Fact are as follows:

A. The Court has jurisdiction of the subject matter herein and the parties hereto.

B. That it was the intent of the parties in the Miller, Anderson - Lester, Hibnes and Hibnes option agreement of March 9, 1972, to create a lien on

the premises commonly known as the Twi-Lite Lounge.

C. That the plaintiff as the successor in interest to Miller and Anderson should take the property subject to all claims and interests which Miller and Anderson had obligated the property.

D. That the plaintiff has assumed and fully fulfilled all the obligations of the Millers and Andersons to the Skidmores and has fully performed and paid all obligations as required to be performed by the Millers and Andersons under the terms of the Skidmore's contract since May 12, 1972.

E. That since May 12, 1972, the plaintiff has purchased and/or succeeded in all right, title and intterest of the Stanley Fretwells in and to the subject property of the Skidmore's contract.

F. That under and by virtue of the sale and conveyance of the subject property, from Millers and Anders to plaintiffs and plaintiff's predecessors and interest and by virtue of plaintiff's acquisition and/or succession of the predecessors' interest therein the plaintiff is the sole owner of the equitable title of the real property herein described subject to the legal title of the Skidmore, and is entitled to possession thereof.

G. That theplaintiff is the sole owner and is vested with absolute title to the personal property therein described by virtue of the provision in the Skidmore's contract vesting title thereto in the Millers and Andersons on August 1, 1971, and the sale and conveyance thereof from Millers and Andersons to the plaintiffs and plain-

tiff's predecessor and title and interest on May 12, 1972, and is manifested by the Bill of Sale dated March 2, 1982.

H. That the plaintiff has no plain, speedy or adequate remedy of law in which to protect himself against the claims of the numerous defendants set forth in the style of this case and the Court does and should employ equitable jurisdiction to determine the same and clear the title to the subject proeprty.

I. That the defendants have a resultant equitable lien in said property in the amount of $11,495.71.

J. That the plaintiff, as a successor in interest to the Millers and Andersons, should be subject to the burdens imposed on the land by his predecessors under the theory of equitable lien.

K. That the documented lien of the defendants is not a mortgage pursuant to the provisions of Idaho Code 45-901 et seq.

L. That plaintiff, as successor in interest to Millers and Andersons, would be unjustly enriched if he were permitted to retain all sums paid by defendants to his predecessors in interest or obligations to defendants assumed by them.

M. That plaintiff purchased the subject property with notice that Miller and Anderson had granted defendant's Lester, Hibnes and Hibnes a lien interest therein as set forth in Finding #54.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Based upon the foregoing Findings of Fact and Conclusions of

Law as follows:

I. That the plaintiff herein be vested with title to the personal property herein.

II. That the plaintiff be vested with equitable title to the real property herein in contest.

III. That the defendants, Lester, Hibnes andHibnes be granted an equitable lien against the above-entitled property in the amount of $11,495.71 to accrue at the statutory rate of interest hereafter.

IV. That the defendants be enjoined and restrained and forever barred from asserting any interest in the subject real property but for the equitable lien herein set forth.

IT IS SO ORDERED.

DATED This 30th day of March, 1982.

/s/ Stephen W. Drescher
Magistrate

IDAHO SUPREME COURT/COURTS OF APPEALS

EARL F. McGILL, Plaintiff-Respondent,	)	O R D E R
v.	)	NO. 14686
DONALD B. FRETWELL, ET AL., Defendants	)	Reference No. 83-18
and	)	
ELMER LESTER, JOHN HIBNES, SR., and JOHN HIBNES, JR., Defendants-Appellants.	)	

COUNSEL:

The Court has DENIED Appellants' MOTION TO VOID ORDER filed January 31, 1983.

FURTHER, the Court has RESERVED RULING on Respondent's MOTION TO DISMISS appeal filed February 4, 1983 until oral argument on the merits of this appeal.

DATED this 3rd day of March, 1983.

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

cc: Counsel of Record

IDAHO SUPREME COURT/COURT OF APPEALS

EARL F. McGILL,)
Plaintiff and) O R D E R
Respondent,) NO. 14686
v.) Ref. No. 83-18
DONALD B. FRETWELL,)
ET AL.,)
Defendants,)
and)
ELMER LESTER, JOHN)
HIBNES, SR., and)
JOHN HIBNES, JR.,)
Defendants and)
Appellants.)

COUNSEL:

The Court has ORDERED that Appellants' MOTION FOR RECONSIDERATION OF MOTION TO VOID ORDER filed March 11, 1983 be, and hereby is, DENIED.

DATED this 8th day of April, 1983.

I, Frederick C. Lyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office. WITNESS my hand and the Seal of this Court 4/8/83

FREDERICK C. LYON Clerk

By: /s/ Marilyn Bourner Deputy

For the Supreme Court

/s/Judy E. Cizmick, Deputy Clerk
Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

cc: Counsel of Record

IDAHO SUPREME COURT

OFFICE OF THE CLERK OF THE COURTS

IDAHO COURT OF APPEALS

May 23, 1983

ADAMSON & YOUNG

1004 7th ST. SOUTH

NAMPA, ID 83651

NOTICE OF COURT ASSIGNMENT

(COURT OF APPEALS)

DOCKET NO. MC GILL, E.

V.

14686 LESTER, E.

The above-entitled AT ISSUE case has been ASSIGNED for hearing by the IDAHO COURT OF APPEALS.

Please complete and return one copy of this Notice within TEN days.

__X__ I desire ORAL ARGUMENT.

_____ I am willing to have this case heard in BOISE.

_____I am willing to have this case heard by TELEPHONE CONFERENCE.

_____I plan to file a STIPULATION TO SUBMIT ON THE BRIEFS.

Counsel:_____

Date:_____

CLERK OF THE COURTS
IDAHO SUPREME COURT BUILDING
451 WEST STATE STREET
BOISE, ID 83720
TELEPHONE: 334-2210

SINCERELY,

FREDERICK C. LYON
CLERK OF THE COURTS

9239 CLB 026/51 15:32:52

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

No. 14686

EARL F. McGILL, Plaintiff/ Respondent, v. ELMER LESTER and JANE DOE LESTER, husband and wife; JOHN HIBNES, SR., and JANE DOE HIBNES, husband and wife; and JOHN HIBNES, JR., and JANE DOE HIBNES, husband and wife, Defendants/ Appellants.	ORDER DENYING PETITION

Appellants have filed a "Petition and Brief for Determination of the Fourteenth Amendment of the United States Constitution and its Application." The petition

seeks a determination that a Supreme Court order appointing the trial judge in this case was invalid. For reasons set forth in the attached special opinion, the petition is hereby DENIED.

DATED this 9th day of November, 1983.

/s/ Jesse R. Walters
Jesse R. Walters
Chief Judge

ATTEST: /s/ Judy E. Azimick
Deputy Clerk

I, Frederick C. Lyon, Clerk of the Court of Appeals of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 11-9-83.

FREDERICK C. LYON Clerk

By /s/ Judy E. Azimick Deputy

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

No. 14686

EARL F. McGILL, Plaintiff-Respondent, v. ELMER LESTER and JANE DOE LESTER, husband and wife; JOHN HIBNES, SR., and JANE DOE HIBNES, husband and wife; and JOHN HIBNES, JR., and JANE DOE HIBNES, husband and wife, Defendants-Appellants.	1983 Opinion No. CA-73 Filed: November 9, 1983 Frederick C. Lyon, Clerk

Appeal from the District Court of the Third Judicial District, State

of Idaho, Canyon County. Hon. Stephen W. Drescher, Magistrate Judge, sitting by appointment of the Idaho Surpeme Court.

Petition filed during pendency of appeal, seeking determination that judge who entered judgment below lacked jurisdiction, denied.

Henry F. McQuade, R. H. Young, and Steven Adamson, of Nampa, Idaho, for appellants-petitioners.

Merlyn W. Clark, Linda L. Holdeman and J. Chalres Hepworth (Hawley, Toxell, Ennis & Hawley) of Boise, for respondent.

UPON PETITION TO DETERMINE VALIDITY OF APPOINTMENT OF TRIAL JUDGE

PER CURIAM

We are asked to decide whether a magistrate judge had subject matter jurisdiction to decide a case in which he had been appointed by our Supreme Court to sit as a district judge. The question has been presented to us by petition during the course of an appeal from a judgment entered by the appointed judge. The question raises a threshold issue of trial court jurisdiction. Interest in this question may extend beyond the immediate parties to this appeal. Under these unique circumstances, we have decided to supplement by special opinion our order disposing of the petition.

While this case was in the district court, the Administrative Judge for the Third Judicial District requested our Supreme Court to assign

the Honorable Stephen W. Drescher, Magistrate Judge of that district, to sit as a District Judge of the district for the purpose of trying and deciding the instant case. Neither of the parties objected to this request, and it was so ordered. Neither did any of the parties object when the appointed judge later proceeded to try the case and rendered his decision.

After judgment was entered, an appeal was filed in the Supreme Court. While the appeal was pending in that Court, prior to being assigned to the Court of Appeals, the appellants moved for a determination by the Supreme Court that its order of appointment had been invalid and that the judge lacked jurisdiction to decide the case below. The motion was denied without comment.

After this case was assigned to the Court of Appeals, the appellants filed a petition, seeking a similar determination and asserting that the order of appointment had infringed upon their right to due process under the fourteenth amendment of the United States Constitution. Appellants argued that the question presented was important to the administration of the trial courts, and that reasons should be given for any ruling upon it. We deny the petition for the reasons discussed below.

Appellants have cloaked their petition to this Court in the garb of the fourteeneth amendment. In Akins v. Texas, 325 U.S. 398, reh'g denied, 326 U.S. 806 (1945), the United States Supreme Court examined, among other issues, the contention of a convicted criminal defendant that he had been denied due

process by the State of Texas because of the manner in which the trial judge was appointed to preside in his case. Relegating this contention to the status of a footnote, the Supreme Court said:

> The legality of the assignment depends upon the validity of the provisions of the state statute as tested by the Texas Constitution.... Whether the state rule is expressed in constitution, statute or decision, or partly in one and partly in another, the state's power is to be viewed as a totality. In the absence of a violation of fundamental principle(s) of justice, a state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned.

325 U.S. at 399-400, n.1. In the present case, the appellants have not argued, and we are unable to discern, any "fundamental principle of justice" which was infringed by the Idaho Sup-

reme Court's appointment of the trial judge. Therefore, the question is narrowed to whether the appointment was made in compliance with state law.

Article V, section 2, of the Idaho Constitution provides that "(t)he judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature.... The jurisdiction of such inferior courts shall be as prescribed by the legislature." Pursuant to this constitutional grant of authority, the Legislature has enacted I.C. §§ 1-2201 to -2222, creating the magistrate division of the district court. Section 1-2208 provides that magistrate judges may hear those specific matters or categories of cases

assigned to them. Section 1-2210 further provides that "(t)he Supreme Court by rule may specify additional categories of matters assignable to magistrates, except that...(certain) matters may not be assigned to magistrates who are not attorneys; ***." Section 1-2210 is awkwardly worded in the negative, but it authorizes the Supreme Court to assign a magistrate judge to hear a case not within the enumerated categories found in § 1-613, which provides in part: "Whenever the administrative director's report indicates that there is need for judicial assistance in any court, the Supreme Court, shall assign to that court any judge for a fixed period or for specific purposes." (Emphasis added.)

As contemplated by § 1-2210, the Supreme Court has exercised its rule-

making authority with respect to such magistrate assignments. Rule 83(a)(3) of the Idaho Rules of Civil Procedure provides that unless otherwise directed by the Supreme Court, an appeal from a judgment entered by an attorney magistrate shall be taken directly to the Supreme Court whenever the Court has assigned the magistrate judge "to hear any action which may otherwise be tried only by a district judge...." This rule deals obliquely, rather than directly, with the appointment of magistrate judges in "additional categories of matters" as contemplated by § 1-2210. However, even if the rule were deemed incomplete in this respect, the defect would relate to the manner in which the Supreme Court has exercised the power granted by the Legislature to determine the jurisdiction of attorney magistrates.

It would not defeat the grant of the power itself. Accordingly, it would, at most, afford a basis to interpose a procedural objection against the appointment of a magistrate to sit as a district judge in a particular case. It would afford no basis to attack the Supreme Court's power to vest jurisdiction in the magistrate

Procedural defects may be waived. Idaho Code § 1-2214 specifically provides that "(a)ll objections to the propriety of an assignment to a magistrate are waived unless made before the trial or hearing begins." Similarly, Rule 82(c)(3) of the Idaho Rules of Civil Procedure provides that any objections to the propriety of an assignment, including the method or scope of the assignment, are waived unless made prior to the trial or hear-

ing. As noted above, no such timely objection was made by the appellants. We conclude that the appellants' petition presented to this Court must be denied.

Both sides have sought a special, interim award of attorney fees with respect to proceedings on this petition. The appellants have not prevailed on the petition. Respondent has prevailed, but in our view the issue raised by appellants was genuine and merited the examination we have accorded it today. Consequently, we decline to make a special award of attorney fees to either party.

No remittitur shall be issued upon this special opinion, but the appeal in due course shall be considered and decided on its merits.

IDAHO SUPREME COURT/COURT OF APPEALS

EARL F. McGILL,	)	
Plaintiff and	)	O R D E R
Respondent,	)	NO. 14686
v.	)	Ref. No.
DONALD B. FRETWELL,	)	83R-18
ET AL,	)	
Defendants.	)	
and	)	
ELMER LESTER, ET	)	
AL.,	)	
Defendants and	)	
Appellants.	)	

COUNSEL:

The Court has ORDERED that Appellants' MOTION FOR ORAL ARGUMENT AND WRITTEN OPINION filed December 13, 1983 be, and hereby is, DENIED.

IT IS FURTHER ORDERED that Appellants' PETITION FOR REVIEW filed November 30, 1983 of the OPINION UPON

PETITION TO DETERMINE VALIDITY OF APPOINTMENT OF TRIAL JUDGE filed November 9, 1983 by the Court of Appeals be, and hereby is, DENIED and this appeal shall be set for Oral Argument on the merits before the Court of Appeals in due course.

DATED this 30th day of December, 1983.

By Order of the Court of Appeals

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk
Supreme Court/Court of Appeals
State of Idaho

cc: Counsel of Record

(SEAL)

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

EARL F. McGILL, Plaintiff/Respondent, vs. ELMER LESTER and JANE DOE LESTER, husband and wife; JOHN HIBNES, SR., and JANE DOE HIBNES, husband and wife; and JOHN HIBNES, JR., and JANE DOE HIBNES, husband and wife, Defendants/Appellants.	Supreme Court No. 14686 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Elmer Lester, et al, the above-named Appellants, hereby appeal from Opinion No. CA-73 of the Idaho Court of Appeals, filed on November 9, 1983, and Order No. 14686 of the Idaho Supreme Court, filed December 30, 1983, denying Appellants' Motion for Oral Argument and Written Opinion and denying Appellants' Petition for Review.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED this _____ day of March, 1984.

ADAMSON, YOUNG & McQUADE

By_____

Henry McQuade
Attorney for Appellants
1004 7th St. South
Nampa, Idaho 83651

APPENDIX C

Article 5, Section 2 of the Idaho Constitution.

"The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The court shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts."

Article 5, Section 12 of the Idaho Constitution.

"Every judge of the district court shall reside in the district for which he is elected. A judge of any district court, or any retired justice of the Supreme Court or any retired district judge made hold a district court in any county at the request of the judge of the district court thereof, and upon request of the governor, or of the chief justice and when any such request is made or approved by the chief justice, it shall be his duty to do so; but a cause in the district court may be tryed by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record and sworn to try the case.***"

Article 5, Section 13 of the Idaho Constitution.

"The Legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the Legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding and the exercise of their powers of all courts below the Supreme Court, so far as the same may be done without conflict with this Constitution,***."

Article 5, Section 19 of the Idaho Constitution.

"All vacancies occurring in the offices provided by this Article of the Constitution shall be filled as provided by law."

Article 5, Section 20 of the Idaho Constitution.

"The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law."

Article 5, Section 26 of the Idaho Constitution.

"All laws relating to courts shall be general and of uniform operation throughout the state, and the organized judicial powers, proceedings, and practices of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts, severally, shall be uniform."

Idaho Code Section 1-213.

"The Supreme Court shall prescribe, by general rules, for all the courts of Idaho, the forms of process, writs, pleadings and motions, the manner of service, time for appearance, and the practice and procedure in all actions and proceedings. Said rules shall neither abridge, enlarge nor modify the substantive right of any litigant."

Idaho Code Section 1-613.

"Whenever the administrative director's report indicates that there is need for judicial assistance in any court, the Supreme Court shall assign to that court any judge for a fixed period or for specific purposes. Any judge so assigned shall serve without additional compensation but shall be paid all reasonable expenses actually incurred by him in the performance of his duties hereunder, including reasonable expenses of travel and sustenance when required to perform duties outside the city of his residence."

Idaho Code Section 1-2208.

"Subject to rules promulgated by the Supreme Court, the administrative judge in each judicial district or any district judge in the district designated by him may assign to magistrates, severally, or by designation of office, or by class or category of cases, or in specific instances the following matters:

(1) Civil proceedings as follows:

(a) when the amount of money or damages or the value of personal property claimed does not exceed two thousand dollars ($2,000.00).

(1) actions for the recovery of money only arising on contracts express or implied; actions for damages for injury to person, property or reputation or for taking or detaining personal property, or for fraud;

(2) actions for rent and distress for rent;

(3) actions for claim and delivery;

(4) proceedings in attachment, garnishment, wage deductions for the benefit of creditors, trial or right of personal property and exemptions, and supplementary proceedings;

(5) actions arising under the laws for the incorporation of cities or counties or any ordinance passed in pursuance thereof; actions for the confiscation or abatement of nuisances and the seizure, condemnation and forfeiture of personal property; proceedings in respect of estrays and lost property;

(6) actions to collect taxes.

(b) Proceedings in forcible entry, forcible detainer, and unlawful detainer; and,

(c) Proceedings for the enforcement and foreclosure of common law and statutory liens of not to exceed two thousand dollars ($2,000) on real or personal property."

Idaho Code Section 1-2210.

"The Supreme Court by rule may specify additional categories of matters assignable to magistrates, except that the following matters may not be assigned to magistrates who are not attorneys:

(a) civil actions in which the amount of money or damages or the value of property claimed exceeds Two Thousand Dollars ($2,000), except as otherwise authorized by this Act;

(b) criminal proceedings in which the maximum authorized punishment exceeds a punishment authorized for misdemeanors;

(c) all proceedings involving the custody of minors and all habeas corpus proceedings;

(d) proceedings for divorce, separate maintenance or annulments; and

(e) proceedings in quo warranto, or for injunction, prohibition, mandamus, ne exeat, or appointment of a receiver."

Idaho Code Section 1-2214.

All objections to the propriety of an assignment to a magistrate are waived unless made before the trial or hearing begins. No order or judgment is void or subject to collateral (collateral) attack merely because rendered pursuant to improper assignment to a magistrate."

Office - Supreme Court, U.S.
FILED
MAY 29 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1540

In The Supreme Court of the United States
October Term, 1983

ELMER LESTER, et al., Appellants

v.

EARL F. McGILL, Appellee.

On Appeal from the Supreme Court of Idaho

MOTION TO DISMISS OR AFFIRM

Merlyn W. Clark
Phillip M. Barber
Hawley Troxell Ennis & Hawley
P.O. Box 1617
Boise, Idaho 83701
Telephone: (208) 344-6000

No. 83-1540

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II. NO SUBSTANTIAL FEDERAL QUESTION IS SOUGHT TO BE REVIEWED IN THIS APPEAL 3

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MOTION TO DISMISS APPEAL OR TO AFFIRM JUDGMENT BELOW

COMES NOW the Appellee, by and through his counsel of record, and pursuant to 28 U.S.C. § 1257 and Rule 16.1 of the Rules of this Court, moves this Court to dismiss this appeal or to affirm the judgment below for the following reasons:

1. This appeal is not within this Court's direct appeal jurisdiction under 28 U.S.C. § 1257(1) and (2).

2. This appeal does not present a substantial federal question and the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on at the appropriate level of procedure required by the law and rules of the State of Idaho governing the question.

3. There is, at this time, no final judgment of the highest Court of the State of Idaho from which an appeal can be taken.

4. The question here presented is so unsubstantial as to require neither further briefing nor argument in this Court.

5. In the event this Court should deem the Notice of Appeal and the Jurisdictional Statement in this appeal as a petition for a writ of certiorari, the petition for writ of certiorari should be denied for the reasons stated above and further explained below.

The bases for this Motion are more specifically described below.

I.

THIS PURPORTED APPEAL FROM THE ORDER OF THE IDAHO COURT OF APPEALS IS OUTSIDE THE JURISDICTION OF THIS COURT FOR DIRECT APPEALS FROM FINAL JUDGMENTS OR DECREES RENDERED BY THE HIGHEST COURT OF A STATE UNDER 28 U.S.C. § 1257.

As the Jurisdictional Statement makes clear, Appellants are not raising the propriety of a state court judgment or decree (1) where the validity of a treaty or statute of the United States is drawn in question and the decision is against its validity or (2) in which the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States is drawn in question and the decision is in favor of its validity. Under 28 U.S.C. § 1257, those are the two jurisdictional bases for a direct appeal to this Court from a decision of the highest Court of the State of Idaho. Instead, this appeal raises questions concerning the propriety of procedure in the Idaho Courts as that procedure may have affected the rights, privileges or immunities claimed under the United States Constitution by Appellants. Under 28 U.S.C. § 1257, review of final decrees or judgments of state courts where the question presented is of this nature, must be had only by writ of certiorari, if at all. 28 U.S.C. § 1257(3).

As the Jurisdictional Statement makes clear, the Appellants are urging that an incorrect application of statutes and rules of the State of Idaho have caused them to be denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. They are not asserting that the Idaho statutes and rules are themselves invalid under the

Constitution of the United States. Under the plain language of 28 U.S.C. § 1257, the only vehicle for review of the questions presented by these Appellants is writ of certiorari.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS SOUGHT TO BE REVIEWED IN THIS APPEAL.

The factual matters relevant to this appeal are, in essence, set forth in the Opinion of the Court of Appeals of the State of Idaho which is found at Pages 45a through 55a of Appendix A of Appellants' Jurisdictional Statement. That Opinion, together with the Order which it supports found at Pages 42a through 44a of that Appendix were denied further review by the Court of Appeals, an intermediate appellate court in the Idaho court system (Order found at Pages 56a through 57a in that Appendix.) Indeed, that is the only record upon which Appellants rely for their assertion of appellate jurisdiction in this Court. In the opinion of the Court of Appeals, that Court states that the issue presented to it was whether under either state or federal constitutional or state statutory provisions of the Appellants were denied due process of law because of the assignment of the trial in this case to an Idaho attorney-magistrate. The Idaho Court of Appeals determined that issue adversely to Appellants on both the state and federal grounds. The issue of the federal constitutional right to trial by a state district judge as opposed to an appointed state attorney-magistrate sitting as a state district judge is the issue which has been sought to be reserved for review by this Court in this appeal.

Briefly stated, the facts, as they are set out in the Opinion of the Idaho Court of Appeals, are these. While this case was awaiting trial in the State of Idaho District Court, the Administrative Judge for the district in which it was pending requested that the Supreme Court assign an attorney-magistrate of that district to try the case. No party objected to that request nor did any party object to the Idaho Supreme Court's Order appointing the attorney-magistrate when entered. Finally, no party objected when the appointed attorney-magistrate proceeded to try the case and render his decision.

Thereafter, following entry of judgment and the filing of an appeal to the Idaho Supreme Court, and while that appeal was pending, the Appellants moved for the first time for an order declaring that the appointment of the attorney-magistrate to sit as district judge in this case was improper and that, therefore, the trial judge lacked "subject matter jurisdiction." Originally that motion was directed to the Idaho Supreme Court and then it was renewed by petition to the Idaho Court of Appeals. The Idaho Court of Appeals examined both the federal and state law questions raised by the Appellants. In the portion of its Order and Opinion, which may be found at Pages 51a through 55a of Appellants' Appendix to their Jurisdictional Statement, the Court carefully reviewed the Idaho State constitutional law, statutory law, and the Idaho Rules of Civil Procedure and determined, as a matter of state law and state statutory construction that there was no substantial defect in the appointment of an attorney-magistrate to sit as a district judge in this case. The Idaho Court further held that, in any event, under the applicable provisions of the Idaho Code and the Idaho Rules of Civil

Procedure, Idaho Code § 1-2214 and Idaho Rule of Civil Procedure 82(c)(3), the failure to raise by objection the propriety of an assignment to a magistrate waived any defect in that appointment and no judgment entered in the absence of timely objection was subject to being overturned by virtue of a possibly improper assignment. This is, fundamentally, a determination of the applicable Idaho State constitutional and statutory law in this instance by a competent Idaho court.

As this Court held in *Akins v. Texas*, 325 U.S. 398 (1945), this Court will leave to the states to determine their own questions of the administration of their judicial systems unless significant due process defects inhere in that system. As this Court stated in the *Akins* case at footnote 1, page 399:

> Whether the state rule is expressed in constitution, statute or decision, or partly in one and partly in another, the state's power is to be viewed as a totality. In the absence of a violation of [a] fundamental principle of justice, a state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned. [Citations omitted.]

The Idaho Court of Appeals, in its opinion, could find no failure of a "fundamental principle of justice" in the assignment and procedure in this case. (Appendix to Jurisdictional Statement at 50a.) It is the propriety of that Court's having so determined which is the sole issue presented to this Court on this appeal.

Appellants have brought no record to this Court which would establish any fundamental failure of the essential elements of due process of law. There is no showing of a failure of notice, of adequate preparation, of trial before a competent judge, of hearing, of right of cross-examination and confrontation, of appellate

review, or any other fundamental premise upon which procedural due process is based. All that Appellants point to in this case is an assertion that an "inferior" judge was sitting in the place of a "superior" judge, a question which is one of local state law and not one of constitutional moment. Indeed, an examination of the careful, lengthy, and detailed "Findings of Fact, Conclusions of Law and Order" entered by the trial judge at the conclusion of trial in this matter (Appendix to Jurisdictional Statement at 5a-35a) reveals that Judge Drescher, an attorney-magistrate sitting as a District Judge, deliberated carefully upon the evidence presented to him at the trial. There is no other record which would rebut the presumption that this case proceeded in an orderly way with the full panoply of rights accorded litigants in the courts of Idaho.

As the Idaho Appellate Court correctly points out in its Opinion, attorney-magistrates are judges within the Idaho judicial system. Under Idaho Code § 1-2206 they must meet a series of qualifications including being 30 years of age, licensed to practice within the State of Idaho, and five years admission to practice for at least five years prior to appointment as a magistrate. Thus the *ipse dixit* of Appellants that an attorney-magistrate in Idaho is, somehow, an "inferior" judge so as to create a question of due process having constitutional dignity before this Court is not supported either in the laws of the State of Idaho or in the record which is appended to their Jurisdictional Statement.

Before this Court will undertake review of alleged procedural failures in a state court's system it has consistently required that the constitutional question raised be substantial. Where it appears that the con-

stitutional question presented is not and was not substantial in character, this Court has consistently declined to note jurisdiction and a litigant does not have a right to review by this Court on such a question. *E.g., Bailey v. Anderson*, 326 U.S. 203 (1945); *Zucht v. King*, 260 U.S. 174 (1922) (Brandeis, J.). That well-established rule is similarly reflected in Parts (b) and (c) of Rule 16.1 of the Rules of the Court. Because there is no record showing a failure of the fundamental principles of justice as is required by *Akins v. Texas*, *supra*, and because the matter has been essentially one of the applicability and the correct interpretation of state law, jurisdiction should be denied. If this Court should treat the Jurisdictional Statement as a petition for certiorari, certiorari should be denied.

The authorities cited by Appellants in their Jurisdictional Statement tend to go to questions of an interpretation of Idaho procedural law. If they are complaining that the Order of the Appellate Court below changed the law announced in *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975), that is purely a question of state procedure and not one which rises to the dignity of an issue for this Court. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924).

III.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED IN THIS APPEAL WAS NOT TIMELY NOR PROPERLY RAISED NOR PASSED ON BY THE HIGHEST COURT IN THE STATE OF IDAHO

Idaho Code § 1-2214 requires that the question of assignments of magistrates to cases must be raised by objection before the trial of the action begins and that "no order or judgment is void or subject to collateral

attack merely because rendered pursuant to improper assignment to a magistrate." That same requirement of prior objection is required by Idaho Rule of Civil Procedure 82(c)(3). The issue was first raised in and finally determined by the Idaho Court of Appeals, an intermediate appellate court. It has previously been raised in the Supreme Court, but that Court's decision (Appendix to Jurisdictional Statement at 38a-39a) preceded the case's assignment to the intermediate appellate court. No subsequent review by the Idaho Supreme Court has been had on the issue presented to this Court for its review. Indeed, at the present time, the entire subject matter of the appeal in this case is still pending in the appellate courts in Idaho.

It has long been the rule, which is incorporated in Rule 16.1(b) of the Rules of this Court, that a federal question sought to be reviewed must be timely and properly raised and expressly passed on below before this Court will have jurisdiction over an appeal from a state court. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-52 (1962); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649 (1942); *Bailey v. Anderson*, 326 U.S. 203 (1945).

The Idaho statute and rule of procedure clearly required that objection be made before trial in this instance. As the Order of the Idaho Court of Appeals makes clear, no such objection occurred until after the appeal in the state courts had been filed. Thus, in this case, the federal question raised for review in this Court was neither timely nor properly raised in the courts in the State of Idaho.

CONCLUSION

The essence of the argument set forth above is simply that the issue raised here is so insubstantial as not

to rise to the dignity of this Court's appellate jurisdiction. Much of what is argued relates to questions of Idaho state law, questions which have been firmly decided in this case by a competent Idaho State Court. There has been no showing of specific abuses of due process, only that Idaho's system for appointing judges as it was exercised in this case properly fit Idaho jurisdictional statutes, a question fully decided by the Idaho State Court. That issue is for the Idaho Court to decide. No fundamental principle of justice has been offended here. Indeed, no objection was raised at an appropriate time under Idaho law so as to allow any cure of technical defect which might have occurred. No question has been raised of any statute of the State of Idaho's being repugnant to the Constitution, treaties or laws of the United States. All that is being complained of is a question of technical Idaho procedural law which has been determined appropriately in Idaho.

For all of these reasons we ask that the appeal in this case be dismissed or the Judgment and Order below be affirmed and, if this Court should treat the Jurisdictional Statement in this case as a petition for certiorari, that certiorari be denied.

RESPECTFULLY SUBMITTED this 25th day of May, 1984.

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APPENDIX

Idaho Code § 1-2206:

1-2206. Magistrates — Qualifications — Institute — Exceptions — Office appointive. — (1) A magistrate shall be a qualified elector of the county for which he is appointed and shall reside there so long as he serves as magistrate, except that qualified nonresidents may be appointed as magistrates when no qualified resident elector is available.

(2) No person shall be eligible for appointment to the office of magistrate unless he is a graduate of a high school or has attained the equivalent of a high school education as indicated by the possession of a certificate of equivalency issued by the state department of education based upon the record made on the general education development test.

(3) Magistrates shall not take office for the first time as magistrates until they have attended an institute on the duties and functioning of the magistrate's office to be held under the supervision of the Supreme Court, unless such attendance is waived by the Supreme Court. All magistrates shall be entitled to their actual and necessary expenses while attending institutes. The Supreme Court will establish the institute to which this subsection refers and will provide that the institute be held every two (2) years between the time of the general election and December 31 of that year, and the Supreme Court may establish an institute at such other times and for such other purposes as it deems necessary and may require the attendance of magistrates.

(4) Notwithstanding the provisions of subsection 2 of this section, all probate judges, justices of the peace and police judges holding office after the second Monday of January, 1969, shall be eligible, upon resignation or upon the expiration of their terms, for the appointive office of magistrate.

Idaho Code § 1-2214:

1-2214. Objections to assignment — Waiver. —All objections to the propriety of an assignment to a magistrate are waived unless made before the trial or hearing begins. No order or judgment is void or subject to collaterial [collateral] attack merely because rendered pursuant to improper assignment to a magistrate.

Idaho Rules of Civil Procedure, Rule 82(c)(3):

Rule 82(c)(3). Objection to assignment to magistrates. — Any irregularity in the method or scope of assignment of a civil action or proceeding to any magistrate under this rule 82, and sections 1-2208 and 1-2210, Idaho Code, and all objections to the propriety of an assignment to a magistrate are waived unless objection is made before the trial or hearing begins. No order or judgment is void or subject to collateral attack merely because rendered pursuant to an improper assignment to a magistrate.